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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 71-6732

JAMES CHAFFIN - - - - - *Petitioner*

v.

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION OF ATTORNEY GENERAL OF TENNESSEE FOR LEAVE TO FILE OUT OF TIME BRIEF AMICUS CURIAE

BRIEF OF THE ATTORNEY GENERAL OF TENNESSEE AS AMICUS CURIAE LIMITED TO THE FORM OF RELIEF IN THE EVENT OF A DECISION FOR THE PETITIONER

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The Attorney General of Tennessee respectfully would show unto the Court this case was argued February 22, 1973. The decision in this case will not be delayed by a consideration of the narrow issue discussed here by *amicus* —whether, in the event of a holding that on retrial before a jury a more severe penalty cannot be imposed, the Federal District Court appropriately merely should order the excess sentence void, or should the Federal District Court grant an entirely new trial? The proposed brief is attached to this motion in support of the former solution.

WHEREFORE, in the interest of justice and because of the importance of this question, the Attorney General of Tennessee respectfully prays he be allowed to file out of time this brief as *amicus curiae* on the issue of relief.

Respectfully submitted,

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Interest of Amicus

The Attorney General of Tennessee represents petitioners in three cases in which certiorari is pending before the Court. The issue is the same as the instant case—the validity of a jury imposed stiffer sentence at the second trial. The cases are *Rose v. Rivera*, No. 72-400 (filed September 8, 1972); *Neil v. Pendergrass*, No. 71-1472 (filed May 11, 1972) and *Linder v. Recor*, No. 71-1281 (filed April 6, 1972). In all

three, the United States Court of Appeals for the Sixth Circuit remanded to the courts of Tennessee for retrial, resentencing by a jury, or resentencing pursuant to Tenn. Code Annot. § 40-2701, as amended by the Tennessee Legislature, Ch. 591, Pub. Acts of 1972.[1]

Amicus is hopeful the Court's opinion, if unhappily it is favorable to petitioner Chaffin, will indicate to the federal courts it is not necessary to have a *third* trial. Rather, the U. S. District Court should strike as void the excess sentence. It would be a burden on Tennessee and other states to retry defendants.

ARGUMENT

Defendants should not be given a windfall wherever at a second trial the sentence imposed is not exactly equal to the sentence imposed at the first. Habeas corpus is broad enough so the judge could enter an order merely enjoining the State from imposing any conditions upon the second sentence more onerous or restrictive than the first sentence. For cases where this was done see *Britt v. Tollett*, 315 F. Supp. 401 (E.D. Tenn. 1970); and *Ward v. Henderson*, 371 F. Supp. 344 (W.D. La. 1970) (where the chief judge of that district found a *Witherspoon*[2] violation and found under Louisiana law it was questionable whether the state court had jurisdiction to reduce a death sentence to life imprisonment. The court, noting it had authority to dispose of the case "as the law and justice require," enjoined Louisiana from executing the petitioner and ordered he "be held in custody under no more onerous

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[1] The retroactivity of this statute has not been determined. Defense counsel are already urging it is not retroactive.

[2] Witherspoon v. Illinois, 391 U.S. 510 (1968).

conditions than had he been sentenced to life imprisonment in the original trial." *Id.* at 348).

The Court said:

> "While it would be desirable in the interest of federal-state comity to look to state procedures and practices to correct the illegal sentence imposed here, the petitioner should not remain under an illegal sentence because the state provides no clear-cut procedures to correct its constitutional error. Especially is this so in light of the state's prior failure to remedy its error here. Nor do we feel that a new trial should be granted with its concomitant difficulties when *Witherspoon* emphatically states that the question of guilt is not affected."

In another *Witherspoon* case, Chief Judge Gordon West of the Eastern District of Louisiana issued the writ of habeas corpus and set aside the death sentence previously imposed upon the petitioner and imposed in its place a sentence of life imprisonment. *Cardinale v. Henderson*, 316 F. Supp. 481 (E.D. La. 1970).

28 U.S.C. §2243(h) provides that "the Court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

Carafas v. LaVallee, 391 U.S. 234, 239 (1968) noted that "the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted." *Peyton v. Rowe*, 391 U.S. 54, 66 (1968), held federal habeas corpus gives a court power to fashion appropriate relief other than immediate release, saying "(the writ) is not now and never has been a static, narrow, formalistic remedy ..."

Bozza v. United States, 330 U.S. 160, 166 (1947), teaches that "(t)his Court has rejected the doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed an error in passing sentence," quoting *In Re Bonner*, 151 U.S. 242, 260 (1894).

In *In Re Bonner*, Bonner had been sentenced to a term by a United States territorial court which exceeded that court's authority. This Court quoted the Pennsylvania Supreme Court in saying: "The common law embodies in itself sufficient reason and commonsense to reject the monstrous doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established." *Id.*, at 261. In sending the case back to the lower federal court only for resentencing, this Court said: "The end sought by him—to be relieved from the defects in the judgment rendered to his injury—is secured, and at the same time the community is not made to suffer by a failure in the enforcement of justice against him." *Ibid.*

This Court noted that it "is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus," citing the old habeas corpus section, §761 of the Revised Statutes, which provided that: "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." *Ibid.*

Johnson v. Avery, 393 U.S. 483 (1969), used habeas corpus to strike down a regulation of the Tennessee State

Penitentiary which forbade inmates to write writs for other inmates. The complaint was not treated as a petition for injunctive relief. The relief fashioned, the invalidation of the prison regulation, was accomplished within the framework of traditional federal habeas corpus. Mr. Justice Fortas wrote approvingly that "(t)he District Court treated this motion as a petition for the writ of habeas corpus, and, after a hearing, ordered him released from disciplinary confinement and restored to the status of an ordinary prisoner." *Id.*, at 484.

A District Court has the power given by 28 U.S.C. §2243 either to modify the sentence or to enjoin the warden from holding the prisoner under conditions more stringent than the sentence the prisoner received at his first trial. This should be done rather than allowing a prisoner to possibly "escape punishment altogether because the court committed an error in passing sentence." *In Re Bonner, supra.*

CONCLUSION

In the event this case is decided for the petitioner, the relief granted should be to strike as void the excess sentence.

Respectfully submitted,

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